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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

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The following reply is submitted by Petitioners, The Boeing Company, *et al.* ("Boeing") solely in response to new matter raised by one of the three briefs for respondents in opposition. Boeing respectfully submits that the claim of the respondents that the issue in this case is not relevant or important to the conduct of class action litigation is erroneous.

ARGUMENT

The Decision of the Court of Appeals Will Significantly Affect the Conduct of Class Action Litigation.

Only one of respondents' three briefs, that of Stuart D. Wechsler, questions the importance of this case to the conduct of class action litigation. Petitioner believes that this Court should be aware of the warmed-over and contrived nature of these contentions.

First, it is argued that this case is unimportant because it is the only securities class action which has proceeded

through trial to a money judgment. In fact, even if one searches only for federal securities class actions in which plaintiff has obtained a money judgment, a substantial number of recent published opinions may easily be found.* Many more unpublished decisions undoubtedly exist.

Moreover, the importance of the Court of Appeals decision is not limited to class actions which result in a judgment after trial. The Court of Appeals expressly recognizes the effects its opinion will have on decisions to bring class actions, 14a ("a ruling for Boeing . . . would deter lawyers from bringing . . . [class action] lawsuits"), and on decisions to settle these actions. 16a-17a.

Second, it is argued that the Court of Appeals decision, which is elsewhere referred to as a "securities class action", Wechsler Brief at 9, is unimportant because it is not based on federal law. This Court will search the Court of Appeals opinion in vain for any such limiting principle or for any reliance on N.Y. Judic. Law § 475 (McKinney 1968). Instead, the Court of Appeals broadly declares "that the fees and costs of counsel may be assessed against the unclaimed portion of [any] class action judgment." 3a.

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* *E.g., Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793 (3d Cir.), *cert. denied*, 99 S. Ct. 318 (1978); *Gould* v. *American-Hawaiian S.S. Co.*, 535 F.2d 761 (3d Cir. 1976); *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064 (7th Cir. 1975), *vacated and remanded*, 425 U.S. 929 (1976); *Swanson* v. *American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975); *Sharp* v. *Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978); *Smithkline Corp.* v. *Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 99 S. Ct. 123 (1978); *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), *modified*, 540 F.2d 27 (2d Cir. 1976); *Elkind* v. *Liggett & Myers, Inc.*, CCH Fed. Sec. L. Rep. ¶ 96,602 (S.D.N.Y. 1978); *Adams* v. *Standard Knitting Mills, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,683 (E.D. Tenn. 1976); *Del Noce* v. *Delyar Corp.*, CCH Fed. Sec. L. Rep. ¶ 95,670 (S.D.N.Y. 1976).

Another dozen securities class action decisions have recently been published in which the defendant has prevailed.

The opinion is based squarely on federal law and *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). 7a-11a. It represents a substantial expansion of Fed. R. Civ. P. 23.

Third, it is claimed that Boeing has no standing to question an award of attorneys' fees. In essence, this Court is asked to decide that Boeing does not have even a colorable claim to funds which are ultimately unclaimed by the class, a subject on which the Court of Appeals expressly "intimate[d] no view", 14a n.17, and hence that Boeing has no interest in the siphoning off of those funds by plaintiff's attorneys. This argument was too insubstantial to merit discussion by the Court of Appeals. Boeing has a strong claim, which it intends to vigorously pursue, to unclaimed funds in this action.*

CONCLUSION

Both because of the important effect of this decision on class action litigation, and because the decision materially alters the American Rule on attorney's fees as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals (*en banc*).

Dated: New York, New York
April 6, 1979

Respectfully submitted,

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* *See, e.g., Willametz* v. *Susi*, 489 F.2d 364, 366 (1st Cir. 1973); Uniform Class Actions Act § 15(c)(5) & (6) in 12 Uniform Laws Annotated (Cum. Supp. 1978); Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1521, 1527 (1976).